THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0069, Peter Paul Mitrano v. Matthan Houser & a., the court on November 30, 2004, issued the following order:

Having considered the parties' briefs and the record submitted on appeal, the court affirms the decision of the trial court. See Supreme Court Rule 25(8).

Affirmed.

Broderick, C.J., and Nadeau, Dalianis, Duggan and Galway, JJ., concurred.

Eileen Fox
Clerk

THE STATE OF NEW HAMPSHIRE
GRAFTON,SS. SUPERIOR COURT

Peter Paul Mitrano

vs.

Matthan Houser
Brendan Herbert
and
John Turner

No. 2001-C-155

ORDER

This matter is before the Court on the defendants' request for an assessment of damages. A hearing was held on December 12, 2003. The defendant Brendan Herbert was present and represented by counsel. The plaintiff and cross-defendant, Peter Paul Mitrano, appeared pro se. At the commencement of the hearing, plaintiff Mitrano filed a multifaceted motion styled Plaintiffs Motion to Strike the Default Previously Entered and, in the Alternative, Plaintiffs Opposition to Award of Any Damages to the Defendants, and in the Second Alternative, Plaintiffs Motion for a Directed Verdict on the Issue of Damages. The Court struck the Plaintiffs Motion to Strike the Default Previously Entered Against the Plaintiff and, Plaintiffs Motion for Directed Verdict on the Issue

of Damages, and permitted the Plaintiffs Opposition to the Award of Any Damages to the Defendants. The hearing proceeded by offers of proof.

By way of background, the Court (Morrill, J.), on May 12, 2003, entered an order which read:

> The defendants' Renewed Motion for Entry of Judgment against the plaintiff is GRANTED. Judgment against the plaintiff on the plaintiffs writ and for the defendants on their counterclaim.

(See index #71).

Accordingly, the issue before the Court is the amount of damages, if any, awarded to the defendants from plaintiff on defendants' counterclaims.

The defendants' counterclaims filed in this matter are as follows: (1) Breach of Covenant of Quiet Enjoyment under both RSA 540-A:2 and Common Law; (2) Fraudulent Misrepresentation; (3) Negligent Misrepresentation; (4) Breach of Implied Warranty of Habitability; and (5) Attorney's Fees and Costs under both RSA 540:4 and Common Law. In addition, the defendants request damages on their counterclaim under RSA 540-A:4, IX, arguing that any landlord who violates RSA 540-A:2 or any provision of RSA 540-A:3, shall be subject to civil remedies set forth in RSA 358-A:10, including costs and reasonable attorney's fees incurred in the proceeding.

The Court finds that the defendants are entitled to actual damages incurred as the result of the plaintiff Mitrano's willful breach of the covenant of quiet enjoyment in violation of RSA 540-A:2. In addition, the Court finds that the defendants, on their counterclaim, are entitled to civil remedies as set forth in RSA 358-A:10, including costs and reasonable attorney's fees incurred in the proceeding. The default entered against the plaintiff on defendants' counterclaim includes a finding under RSA 540-A:2, that no landlord shall willfully violate a tenants right to quiet enjoyment of his tenancy. The remedies provision of RSA 540-A:4, provide in relevant part:

> VII. Upon a showing of a violation of RSA 540-A:2...the court shall grant such relief as is necessary to protect the rights of the parties. Such relief may include: ... (b) An award of damages to the plaintiff for the violations of RSA 540-A, breach of warranty of habitability, breach of covenant of quiet enjoyment or any other claim arising out of the facts alleged in the plaintiffs petition.

Thus, the civil remedies available under the New Hampshire Consumer Protection Act, RSA 358-A:10, are applicable here, where the Court has entered judgment against plaintiff Mitrano on the defendants' counterclaim for breach of quiet enjoyment under RSA 540:A:2. RSA 358-A:10, provides for actual damages, and if the court

finds that the act or practice was a willful or knowing violation, "it shall award as much as 3 times, but not less than 2 times, such amount." (RSA 358-A:10, *et seq*). In addition, under the statutory provision of the Consumer Protection Act, an award of costs of suit and reasonable attorney's fees are appropriate.

In Carter v. Larhance, 146 N.H. 11 (2001), the New Hampshire Supreme Court addressed the civil remedies provision of the Consumer Protection Act in the context of a landlord/tenant action, holding that those available remedies are mandatory. Id. at 14.

For a breach of implied habitability, which the defendants' counterclaim provides for, "the measure of tenant's damages is the difference between the agreed rent and the fair rental value of the premises as they were during their occupancy by the tenant in the unsafe, unsanitary or unfit condition." Crowley v. Frazier, 147 N.H. 387, 391 (2001).

The Court finds and rules that the defendants are entitled to actual damages in this case. The offer of proof on their counterclaim is that the actual rent charged was $2,900.00 per month. Further, the fair rental value of the premises during the occupancy of the defendants was $1,800.00 per month. The defendants were in the residence seven months. Each of the three named defendants in this case (other tenants were not parties to this action), paid $362.52 of their pro rata share of the rent per month. The difference between the agreed upon rent value and the fair rental value is $2,887.00 ($20,300. x

3/8 = $7,612.50; $12,600.00 x 3/8 = $4,725.00; difference equals $2,887.00).

The defendants also requested damages for increased rent and storage expenses incurred by the defendants when forced to vacate the property five months prior to the expiration of the agreed upon lease term. The offer of proof by the defendants fails to support this claim for damages. The evidence establishes that the three defendants were forced out of the Mitrano off-campus housing as of December 30, 2001. Defendants Herbert and Houser spent part of the next five remaining months on the lease term in California. Defendant Turner spent most of the same period of time in Spain. The defendants indicate they seek no damages for that period of time. In addition, defendant Houser claims storage costs in the amount of $496.00 because he was forced to move out of the off-campus housing and into dormitory housing early upon his return from California. The defendant Houser failed to submit any evidentiary support for his $492.00 in storage costs and accordingly, has failed to meet his burden of proof. The defendants Herbert, Turner and Houser, from January 1, 2002 until approximately May 30, 2002, were not tenants and did not incur costs as the result of their counterclaim against Mitrano and accordingly, increased rent and storage expenses are denied. The fact that these three students next moved back to the Dartmouth College dormitory housing is too far removed in time from the point they vacated the Mitrano building.

RSA 358-A:10 reads that the Court "shall award as much as 3 times, but not less than 2 times," the actual damages incurred. The Court does find that mandatory civil penalties of the Consumer Protection Act are made available in landlord/tenant cases. RSA 540-A:4, IX and Carter v: Lachance, 146 N.H. 11 (2001). In order to apply the multiplier set out in RSA 358-A:10, the court must make a finding under RSA 358-A:2, Acts Unlawful. RSA 540-A:4, IX, reads "Any landlord or tenant who violates RSA 540-A:2...shall be subject to civil remedies set forth in RSA 358-A:10, including costs and reasonable attorney's fees incurred in the proceedings...." In addition, under RSA 358-A:10, "If the court finds the use or method of competition or the act or practice was a willful or knowing violation of this chapter, it shall award as much as 3 times, but not less than 2 times, such amount." RSA 358-A:10, I. Therefore, the Court must make a specific finding under RSA 358-A:2, in order to impose the multiplier provision. The current version of RSA 358-A:2 lists 14 unfair deceptive acts or practices, but the listing is expressly non-exhaustive. Although the statute provides no further explanation and New Hampshire case law is sparse, consultation with both Federal and Massachusetts precedent is helpful. Although RSA 358-A:2 is broadly worded, not all conduct in the course of trade or commerce falls within its protection. See Roberts v. General Motors Corp., 138 N.H. 532, 538 (1994). After observing that it is impossible to establish a fixed definition of unfair or deceptive acts, the Massachusetts Supreme Court enunciated a now commonly

accepted test, adopted by the New Hampshire Supreme Court in Burroghs v. Boles, 141 N.H. 382, 390 (1996), for determining whether conduct is unfair or deceptive. The Court of Appeals stated "the objective conduct must obtain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce. Livingston v. Forbes and Wallace, Inc., 398 N.E.2d, 149, 158 (Mass. App. Ct. 1979). See Tagliente v. Hymmer, 949 F.2d 1, 7 (1st Cir. 1991) (Applying "rascality" test).

The offers of proof establish that the conduct of Mitrano in leasing the subject property to the Dartmouth students was done in bad faith. It is clear that the number of students in this apartment exceeded the permitted rental unit occupancy levels established by the Town of Hanover. The offer of proof established that Mitrano clearly was aware of the number of people in the unit. The Court finds and rules that the conduct of Mitrano does warrant the application of the multiplier. Accordingly, the Court adds to the actual damages found a multiplier of three.

Finally, the defendants, on their counterclaim, request an award of attorney's fees. The defendants have submitted an affidavit of costs and attorney's fees attested to by defendants' counsel. The Court has reviewed the itemized attorney's fees and finds them fair and reasonable in view of the protracted and unnecessarily prolonged nature and extent of this litigation. Accordingly, attorney's fees and costs in the amount of $29,318.83 is awarded.

In summary, the defendant is awarded actual damages in the amount of $2887.00 times a multiplier of 3 for a total damage amount of $8,661.00. Attorney's fees in the amount of $29,318.83 are also awarded for a total verdict of $37,979.83.

SO ORDERED.

Dated: January 2, 2004

Timothy J. Vaughan
Presiding Justice

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0069, Peter Paul Mitrano v. Matthan Houser & a., the court on January 6, 2005, issued the following order:

Appellant's motion for rehearing or reconsideration is denied.

Reconsideration denied.

Broderick, C.J., and Nadeau, Dalianis, Duggan and Galway, JJ., concurred.

Eileen Fox
Clerk